REMARKABLE DEVELOPMENT SDN BHD
v. KIAN MERCULABA SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[SUIT NO: SDK-22NCvC-13-8-2022]
29 SEPTEMBER 2023

Abstract – *(i) A road user does not acquire an unfettered use of the road belonging to another just because he had used the said road for a lengthy period of time without interruption; (ii) A signage conveying restrictions on land use remains legally valid despite prolonged disregard and where no action is taken by the landowner to assert his rights. The landowner's forbearance, from asserting his rights as regard to another's usage of the road, does not relinquish his right to subsequent enforcement; (ii) A landowner, who is fully aware that a portion of his land has been used by another for a prescriptive period, without taking any action to protest, cannot later complain of such act and name it as trespass as he is deemed to have acquiesced to the same.*

LAND LAW: *Right of way – Declaration – Claimant's land located behind lands belonging to counterclaimants – Claimant had been using road which ran through counterclaimants' lands to enter and exit to main road for 20 years – Use of road done with counterclaimants' full knowledge – Claimant prevented from entering or using disputed road after 20 years due to certain incident – Whether claimant acquired unfettered right to use road or equitable rights through long usage and right of way – Land Ordinance (Sabah) (Cap. 68), ss. 14, 41*

CIVIL PROCEDURE: *Jurisdiction – High Court – Land matter – Claimant seeking declaration of unfettered right to use road belonging to others or equitable rights through long usage and right of way – Whether High Court seized with original jurisdiction to hear matter*

TORT: *Trespass – Acquiescence – Claimant's land located behind lands belonging to counterclaimants – Claimant had been using road which ran through counterclaimants' lands to enter and exit to main road for 20 years – Use of road done with counterclaimants' full knowledge – Whether counterclaimant had allowed use – Whether counterclaimant had taken any action against claimant for trespass despite lapse of time since claimant's initial entry – Whether counterclaimants had acquiesced to claimant's use of road*

The plaintiff was the registered owner of a land which was located behind the lands belonging to the first and second defendants. The plaintiff had been using the road, which ran through the first and second defendants' lands ('disputed road'), to enter and exit to the main road from the plaintiffs' land.

A This was in spite of the fact that there was, actually, a road reserve gazetted beside the lands belonging to the plaintiff and the first and second defendants. According to the plaintiff, (i) the road reserve was not useable as it was yet to be constructed and was not suitable for the purpose of transporting fresh fruit branches; (ii) the plaintiff had been using the disputed road for 20 years, B since 2002 until August 2022, with the defendants' full knowledge; and (ii) things, however, took a turn in 2022 when the third defendant's managing director nearly collided with the vehicle driven by the plaintiff's employee on the disputed road. Following the incident, a gate/barrier was erected at the entrance of the first and second defendants' lands, preventing the plaintiff C from entering or using the disputed road. The plaintiff commenced the present action for, *inter alia*, a declaration that it had acquired an unfettered right to use the disputed road or, in the alternative, equitable rights through long usage and right of way, pursuant to s. 2 of the English Prescription Act 1832. The defendants raised a preliminary objection that the issue regarding a right of way was a matter within the jurisdiction of the Assistant Collector D of Land Revenue and, therefore, the court was not seized with the original jurisdiction to hear the matter. The defendants counterclaimed and argued that, *inter alia*, (i) the plaintiff was a trespasser as it had been using the disputed road unlawfully and without any permission, consent or approval from the defendants; and (ii) a signboard had been put up at the entrance to E their lands, stating that they were private properties and all trespassers would be prosecuted. The defendants claimed for losses and damages against the plaintiff for its unlawful use of the disputed road from 2002 until August 2022.

F **Held (dismissing plaintiff's claim and defendants' counterclaim):**

(1) The defendants' reference to certain cases, to support the proposition that the court was not seized with the jurisdiction to hear the dispute, was misconceived as those cases were distinguishable from the present case. If the defendants were correct in their preliminary objection, then G the court was shut out from ever rendering equitable reliefs pertaining to such issues as a right of way. That could not be correct as there were ample decisions by the courts suggesting otherwise. Therefore, there was no basis for the defendants' contention that the court was not seized with the jurisdiction to decide on this matter. The court proceeded to hear the plaintiff's claim on its merits. (paras 14, 18 & 19)

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(2) Signs on land, indicating that a certain activity was prohibited on that land, were sufficient to render the subsequent activity contentious even where the sign was wholly ignored for the prescriptive period and no attempt was made to enforce the landowner's rights. Although the I defendants did not do anything to assert their rights as regard to the plaintiff's usage of the disputed road, it did not extinguish the defendants' right to, later on, do so. (paras 37 & 38)

(3) The plaintiff's insistence, that they had acquired a right of way over the disputed road, and their claim for equitable remedy, could not be seen in isolation without having regard to the indisputable fact that there was a road reserve gazetted beside the lands belonging to the plaintiff and the first and second defendants. The witnesses who testified as to having used the disputed road were the plaintiff's workers. There was no evidence that the general public was also using the disputed road; there was no evidence that apart from the plaintiff, the public stood to benefit from the grant of the declaration for right of way in this action. It was solely for the plaintiff's benefit alone. (paras 28, 39 & 43)

(4) The plaintiff's claim for equitable reliefs was to be distinguished from an application for right of way under the Sabah Land Ordinance. Although the plaintiff claimed that the road reserve was not useable or suitable to transport fresh fruit branches, one must not lose sight that the plaintiff claimed to have been using the disputed road for over 20 years. It was appropriate to question why they had not taken steps to obtain the permission from the Lands and Surveys Department and have the road reserve properly constructed all those years and only did so in August 2022. It was insufficient for the plaintiff, in seeking equitable remedies to the detriment of the defendants who were the rightful landowners, to conveniently use the disputed road without any evidence of efforts made on their part to have the alternative road constructed. (paras 44 & 45)

(5) The defendants' own workers had allowed the plaintiff to use the disputed road. There was also no dispute that, despite the lapse of time since the plaintiff's initial entry in 2002, the defendants had not taken any action against the plaintiff for trespass. By allowing the plaintiff to use the disputed road, the defendants had acquiesced to the same. The plaintiff's defence to the defendant's counterclaim was made out. (paras 50, 51 & 54)

Obiter:

(1) At first blush, the holding that the plaintiff's defence to the defendants' counterclaim was made out may seem inconsistent with the decision on the plaintiff's claim. However, both the plaintiff's claim and the defendants' counterclaim were decided based on their respective causes of action. In other words, while the plaintiff's assertions amounted to a defence to trespass, this did not automatically establish the plaintiff's claim for unfettered right over the disputed road. (para 54)

Case(s) referred to:

Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 ***(refd)***
Bell v. Alfred Franks & Bartlett Co Ltd & Anor [1980] l All ER 356 ***(refd)***
Che Nik Bakar v. Pentadbir Tanah, Kuala Krai [1997] 5 CLJ 93 HC ***(dist)***
Freddolin Ujoe v. Bigraise Inanam Sdn Bhd [2014] 9 CLJ 198 HC ***(refd)***
Ibnuhaili @ Holly Jauhali & Ors v. Borneo Samudera Sdn Bhd & Ors [2021] 1 LNS 1177 HC ***(dist)***
Inverugie Investments Ltd v. Hackett [1995] 3 All ER 841 ***(refd)***
Kwong Hing Realty Sdn Bhd v. Malaysia Building Society Bhd & Anor [1997] 1 CLJ Supp 167 HC ***(refd)***
Ladang Sri Harapan (Sabah) Sdn Bhd v. Perfect Oil Resources (Sabah) Sdn Bhd [2021] 1 LNS 126 HC ***(dist)***
Lee Ling Timber Sdn Bhd v. Bukit Mas Indah Sdn Bhd & Ors [2015] 1 LNS 1511 CA ***(dist)***
Leven Holdings Ltd v. Johnston & Ors [2018] EGLR 17 ***(refd)***
Lye Thean Soo & Ors v. Sykt Warsaw [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160 SC ***(dist)***
Mega Land Plantation Sdn Bhd v. The Squatters And/Or Illegal Occupiers On The Land Held Under Country Lease No 115510604 Situated At Ulu Tingkayu In The District Of Lahad Datu, Sabah [2022] 1 LNS 1176 HC ***(dist)***
Ng Yee Fong & Anor v. EW Talalla [1985] 1 LNS 146 FC ***(refd)***
Petronas Dagangan Bhd v. Karamunting Development Sdn Bhd [2016] 5 CLJ 56 CA ***(refd)***
Sabah Forest Industries Sdn Bhd v. Mazlan Ali [2012] 10 CLJ 761 HC ***(dist)***
Wangsa Timber Industries Sdn Bhd & Ors v. Adulfast Anthony Robert & Anor [2001] 4 CLJ 498 CA ***(refd)***
Winterburn & Anor v. Bennett & Anor [2017] 1 WLR 646 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(b)
Land Code (Sarawak) (Cap. 81), s. 34
Land Ordinance (Sabah) (Cap. 68), ss. 14, 41
National Land Code, s. 390(3)

The Prescription Act 1832 [UK], s. 2

For the plaintiff - Caroline Hee; M/s Tan Pang Tsen & Co
For the defendants - Jeyan Marimuttu & Eric Chong; M/s J Marimuttu & Partners

Reported by Najib Tamby

JUDGMENT

Celestina Stuel Galid J:

Introduction

[1] Does a road user acquire an unfettered use of the road on account that he has used the said road for a lengthy period of time without interruptions?

[2] This was the question to be answered in this action.

Background Facts

[3] The lands held under CL085314405, CL085325953 and CL085325417 were registered in the first defendant's name ("the first defendant's lands") while the second defendant owned those held under CL085325355 and CL085325079 ("the second defendant's lands"). The plaintiff was the registered owner of the land held under CL085327984 which was located behind the first and second defendants' lands. All of the lands were situated at Mile 70, Sandakan – Kota Kinabalu Road, Beluran, Sabah.

[4] By this action, the plaintiff, *inter alia*, sought to have it declared that they have acquired an "unfettered" right to use the road which ran through the first defendant's lands and the second defendant's lands (hereinafter referred to as "the disputed road").

[5] The defendants counterclaimed against the plaintiff for trespass of the disputed road.

The Plaintiff's Case

[6] The plaintiff claimed that they had been using the disputed road to enter and exit to the main road from the plaintiff's land for 20 years since 2002 and that they did so with the defendants' full knowledge all those years.

[7] However, arising from an incident on 15 August 2022 where the third defendant's managing director (DW3) nearly collided with a vehicle driven by the plaintiff's employee on the disputed road, the defendants prevented the plaintiff and or their staff, employees, agents or servants from entering upon the first and second defendants' lands and using the disputed road. A gate/barrier was erected at the entrance of the first and second defendants' lands, preventing any entry or use of the disputed road.

[8] By this action, the plaintiff claimed that they had acquired an "unfettered" right to use the disputed road, or in the alternative, equitable rights through long usage, and right of way by virtue of s. 2 of the English Prescription Act 1832. They also claimed for loss and damages arising from the blockage of the disputed road.

The Defendants' Case

[9] The defendants claimed that the plaintiff had been using the disputed road unlawfully and without any permission, consent, or approval from the defendants and accordingly they were trespassers.

[10] The defendants also averred that at all material times, they had erected and controlled a gate/barrier at the entrance of their lands and the disputed road situated thereon. The defendants stated that those intending to use the disputed road needed to enter their details in the "buku rekod keluar/masuk" at the guard house near the gate/barrier for security purposes and that this

did not amount to any form of permission, consent or approval for the entry. In addition, a signboard in Bahasa Malaysia had been put up at the entrance to their lands stating that they were private properties and all trespassers would be prosecuted.

[11] The defendants claimed for loss and damage in the sum of RM1,653,700 together with interest for the unlawful use of the disputed road by the plaintiff since 2002 until 15 August 2022.

This Court's Decision

Preliminary Issue – Whether This Court Was Seized With Jurisdiction?

[12] The defendants contended that the issue regarding a right of way was a matter within the jurisdiction of the Assistant Collector of Land Revenue ("ACLR") under the Sabah Land Ordinance ("the Ordinance") and that this court was not seized with the original jurisdiction to hear the matter.

[13] In support, learned counsel for the defendants referred this court to its own decision in *Ladang Sri Harapan (Sabah) Sdn Bhd v. Perfect Oil Resources (Sabah) Sdn Bhd* [2021] 1 LNS 126; [2021] MLJU 607 and Justice Lim Hock Leng's decisions in *Mega Land Plantation Sdn Bhd v. The Squatters And/Or Illegal Occupiers On The Land Held Under Country Lease No 115510604 Situated At Ulu Tingkayu In The District Of Lahad Datu, Sabah* [2022] 1 LNS 1176; [2022] MLJU 1136 and *Ibnuhaili @ Holly Jauhali & Ors v. Borneo Samudera Sdn Bhd & Ors* [2021] 1 LNS 1177; [2021] MLJU 1343 and the Court of Appeal case of *Lee Ling Timber Sdn Bhd v. Bukit Mas Indah Sdn Bhd & Ors* [2015] 1 LNS 1511; [2015] MLJU 2153.

[14] With respect, the references to these cases for the proposition that this court was not seized with jurisdiction to hear the dispute was misconceived as they were distinguishable from the present.

[15] In *Ladang Sri Harapan (Sabah) Sdn Bhd v. Perfect Oil Resources (Sabah) Sdn Bhd* (*supra*), the plaintiff was seeking to injunct or alternatively, stay the decision of the ACLR in granting the defendant a right of way. This court was of the view that it was not seized with jurisdiction to grant the application as the correct procedure was by way of an appeal under s. 41 of the Ordinance.

[16] *Mega Land Plantation Sdn Bhd* (*supra*) and *Ibnuhaili @ Holly Jauhali & Ors v. Borneo Samudera Sdn Bhd & Anor* (*supra*) were in respect of claims of native customary rights ("NCR") which is expressly provided under s. 14 of the Ordinance to be decided by the ACLR.

[17] As for *Lee Ling Timber Sdn Bhd v. Bukit Mas Indah Sdn Bhd & Ors* (*supra*), the issue therein was specifically on whether the High Court has an original jurisdiction to hear and determine the "right of way" between the parties who could not come to an agreement as to which track or path constitutes a "right of way" in the context of s. 34 of the Sarawak Land Code.

[18] Furthermore, if the defendants were correct in their submissions on this point then the court is shut out from ever rendering equitable reliefs pertaining to such issues as a right of way. That cannot be correct as there are ample decisions by the courts suggesting otherwise, see for instance, the Court of Appeal case of *Wangsa Timber Industries Sdn Bhd & Ors v. Adulfast Anthony Robert & Anor* [2001] 4 CLJ 498 and *Sabah Forest Industries Sdn Bhd v. Mazlan Ali* [2012] 10 CLJ 761; [2012] MLJU 687.

[19] I therefore held that there was no basis for the defendants' contention that this court was not seized with jurisdiction to decide on this matter and proceeded to hear the plaintiff's claim on its merits.

On The Plaintiff's Claim

[20] It was submitted for the plaintiff that the evidence before the court showed that the plaintiff had been using the disputed road since 2002 until when the near collision occurred on 15 August 2022 and that in reliance of the defendants' dedication to allow the plaintiff to use the disputed road, the plaintiff had not applied for any right of way nor any written agreement to grant the plaintiff's right of way.

[21] In addition, it was highlighted that the defendants' witnesses (DW1 to DW3) had testified that the defendants never questioned nor written to the plaintiff denying the plaintiff's unfettered right to use the disputed road. There was also no notice to impose toll charges against the plaintiff. It was submitted that the defendants were therefore estopped from denying the plaintiff's right to use the disputed road.

[22] Based on the aforementioned matters, it was submitted that the plaintiff has acquired an "unfettered right" to use the disputed road by dedication, equitable easement or under the Prescription Act 1832.

[23] Learned counsel for the plaintiff relied on the following cases to support their contentions that the plaintiff has acquired a right of way over the disputed road by dedication: *Lye Thean Soo & Ors v. Sykt Warsaw* [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160 and *Sabah Forest Industries Sdn Bhd v. Mazlan Ali* (*supra).*

[24] As the plaintiff heavily relied on the aforementioned cases, it was useful to examine the basis for the courts' decisions therein. The plaintiffs in *Lye Thean Soo & Ors v. Sykt Warsaw* (*supra*), *inter alia*, sued the defendants for obstruction of the access road known as Lot 1277 which for the plaintiffs claimed had been reserved for road and set aside as such and used by the public as such for many years prior thereto.

[25] The Supreme Court held that:

> ... apart from legislation, dedication is also a method by which a right of way may be created. It must be remembered that mere public user does not create a highway. The foundation of public right lies in dedication and dedication presumes a dedicator who in this case only be the owner of the land over which the right of way has been granted. In the absence of any definite proof of actual and deliberate dedication the Courts are entitled to adopt the legal fiction of assuming dedication from proved facts.

[26] In the case *Sabah Forest Industries Sdn Bhd v. Mazlan Ali* (*supra*), while it was the plaintiff which had constructed and maintained the road in question and had been using it without any interruptions, the subsequent landowner later obstructed the plaintiff from accessing it. The issue before the court was "whether the plaintiff by their uninterrupted use of the constructed road had obtained a common law right of way of the defendant's land". The court answered this in the affirmative, however, on the facts, it further held that the plaintiff's right of way was subject to the defendant's right to block access to the constructed road.

[27] One would immediately find distinguishing factors in these cases from the present. Firstly, in *Lye Thean Soo & Ors v. Sykt Warsaw* (*supra*), the road in question namely Lot 1277 had already been reserved as a path to the other lots. More importantly, there was evidence that the said Lot 1277 was used by not only the plaintiffs therein but also "a succession of users" in other words, the public. Hence the phrase "a public right of way". The Supreme Court had stated:

> Nevertheless, the path has been used by public, particularly those living within the vicinity for many years even before he acquired ownership of the land without interruption. He has in fact taken no steps to ensure that a public right of way is not so created. The path has been used and enjoyed by the public as a rights for so many years openly and without interruption and must be known to the owner of the land.

[28] In the present case, not only was the disputed road on the first and second defendants' lands, it was not in dispute that there was in fact a road reserve gazetted beside the plaintiff and the first and second defendants' lands. Furthermore, in contrast, the witnesses who testified as to having used the disputed road in the present case (*ie*, PW2, PW3, PW4, PW5 and PW6) were all workers from the plaintiff's company. There was no evidence that the general public was also using the disputed road at the material time.

[29] The case of *Sabah Forest Industries Sdn Bhd v. Mazlan Ali* (*supra*) was not of any assistance to the plaintiff as the court there had held that the plaintiff's right of way was subject to the defendant's right to block access to the constructed road. Thus, even if this court were to find in favour of the plaintiff on their argument that they had a right of way over the disputed road, that did not take away the defendants' right in blocking the plaintiff's access to it.

[30] Next, the plaintiff relied on the case of *Wangsa Timber Industries Sdn Bhd & Ors v. Adulfast Anthony Robert & Anor* (*supra*) to contend that the Ordinance did not bar the reception of English common law principles in appropriate circumstances. In that case, the Court of Appeal held that on the evidence, the respondents had established a long usage of the access road, and under common law and having regards to the English Prescription Act 1832 and s. 3(1)(b) of the Civil Law Act 1956, they were entitled to claim an easement in respect of the access road.

[31] The plaintiff further cited the case of *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 to contend that a claim for easement may be sustained if the four basic characteristics are present:

(i) there must be a dominant and servient land;

(ii) the easement must accommodate the dominant land;

(iii) the dominant and servient owners must be different persons; and

(iv) the right granted must be capable of forming the subject matter of a grant.

[32] It was submitted that the plaintiff has proved all the necessary elements and established its claim for an equitable easement under common law for the following reasons:

(i) the plaintiff has proved on the balance of probabilities that the defendants have consented/acquiesced to the plaintiff's use of the disputed road. The third defendant immediately denied the plaintiff's access after the near collision incident in August 2022;

(ii) the plaintiff needed access to the disputed road for the purpose of operating their estate and transporting fresh fruit bunches ("FFB") as the road reserve was not fit for that purpose. Furthermore, there was also no other road which could be accessible by the plaintiff from neighbouring landowners and that the plaintiff was not able to apply for permission to be used in such a short period of time; and

(iii) the defendants' witnesses had full knowledge that the plaintiff had been using the disputed road.

[33] The defendants on the other hand relied on the following cases to contend that the plaintiff could not have, in all circumstances of the case, acquired any right of way "as of right", be it under the Prescription Act 1832 or under the doctrine of lost modern grant or at all: *Leven Holdings Ltd v. Johnston And Others* [2018] EGLR 17 (CH) *Winterburn And Another v. Bennett And Another* [2017] 1 WLR 646. It was contended that to succeed, the plaintiff was bound to establish that the entry was:

(i) without force;

(ii) not in secret; and

(iii) not be by permission.

[34] Learned counsel for the plaintiff while not disputing the authorities submitted that the facts in the present case were distinguishable. It was contended that the evidence showed that the recording of details at the entrance of the estate was a standard practice for security purposes and to prevent trespassers. They were never intended as conditions imposed by the defendants in exchange for the use of the disputed road. There was also no evidence that the record books were used to trace and record the plaintiff's entries and exits for toll purposes. The plaintiff was not stopped from accessing the disputed road until August 2022.

[35] For the defendants, it was highlighted that the defendants had at all material times erected a signboard at the entrance to the disputed roads and their lands. The signboards read:

Hak milik persendirian, penceroboh akan didakwa

[36] In addition, the defendants had erected a barrier/gate at the entrance to their lands and anyone who wished to pass through would have to fill in their personal particulars as well as the vehicle plate numbers and the purpose of entry in the "buku rekod keluar/masuk". It was submitted that this book was for the purpose of keeping track of those who entered the defendants' lands, and that it did not amount to permission or consent.

[37] Having considered the authorities cited by both parties, I was more persuaded by the cases cited by the defendants on this issue. In *Winterburn*, it was held that signs on land indicating that a certain activity is prohibited on that land are sufficient to render the subsequent activity contentious (thus preventing the activity maturing into an easement, or perhaps frustrating its registration as a town or village green), even where the sign is wholly ignored for the prescriptive period, and no attempt is made to enforce the landowner's rights.

[38] In the present case, although the defendants did not do anything to assert their rights as regards the plaintiff's usage of the disputed road as evinced by the "buku rekod keluar/masuk", in my view, it did not extinguish the defendants' right to later on do so as was in this case. For if that was the case, then the plaintiff would have had a free hand in coming and going through the disputed road all those years without even having to record their details at all, in short, go through "as of right". But that was not the case.

[39] In addition, the plaintiff's insistence that they had acquired a right of way over the disputed road and their claim for equitable remedy could not be seen in isolation without having regard to the indisputable fact that there was a road reserve gazetted besides the plaintiff and the first and second defendants' lands (see item 7 of the amended statement of agreed facts).

[40] The plaintiff claimed that this road reserve was not useable as it was yet to be constructed and was not suitable for the purpose of transporting FFB. In support, the plaintiff had referred to the following quotation from the case of *Freddolin Ujoe v. Bigraise Inanam Sdn Bhd* [2014] 9 CLJ 198 which quoted the decision in *Lye Thean Soo & Ors v. Sykt Warsaw*:

> Until the "reserve" is taken over by the appropriate authority it is only a road for some future use. Without the consent of the owner, a person using the road would be a trespasser.

[41] However, the said quotation must be read in the light of the observation by the Court of Appeal in *Petronas Dagangan Bhd v. Karamunting Development Sdn Bhd* [2016] 5 CLJ 56 that:

> [25] ... the passage quoted by learned trial judge from the Supreme Court decision in *Lye Thean Soo & Ors v. Sykt Warsaw* [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160; [1990] 3 MLJ 369, namely, "Until the 'reserve' is taken over by the appropriate authority it is only a road for some future use. Without the consent of the owner a person using the road would be a trespasser", was clearly part of the submission of counsel for the defendant in that case and not the *ratio* or observation of the court on a matter of principle or the law.

[42] As for the case of *Che Nik Bakar v. Pentadbir Tanah, Kuala Krai* [1997] 5 CLJ 93 which was cited by the court in *Freddolin Ujoe v. Bigraise Inanam Sdn Bhd* (*supra*), it too was distinguishable as the court there was dealing with an appeal on the decision by the Land Administrator who granted an order under s. 390(3) of the National Land Code for a public right of way. The court specifically had agreed with the finding of the land administrator on the importance of the road to the public. The court further stated that:

> ... since s. 390(3) of the Code allows for the creation of public right of way on private land, that principle must be considered in the light of the doctrine of *salus populi supremelex* – the interests of the public are paramount, and that private interests may in some circumstances be subordinated to the higher interests of the public, when the State thinks it is proper to do so.

[43] As earlier noted, there was no evidence led by the plaintiff that apart from them, the public stood to benefit from the grant of the declaration for right of way in this action. In fact, it was obvious from the prayers sought by the plaintiff that they were solely for the plaintiff's benefit alone.

[44] The plaintiff's claim for equitable reliefs in this action was to be distinguished from an application for right of way under the Ordinance. In this case, it was indisputable that there was a gazetted road reserve besides the plaintiff and the first and second defendants' lands. Although the plaintiff claimed that it was not useable or suitable to transport FFB, one must not lose sight that the plaintiff claimed to have been using the disputed road for over 20 years. Thus, it was appropriate to question why they had not taken steps to obtain the permission from the Lands and Surveys Department and have the road reserve properly constructed all those years and only did so in August 2022.

[45] It was insufficient for the plaintiff in seeking equitable remedies to the detriment of the defendants who were the rightful landowners to conveniently use the disputed road without any evidence of efforts made on their part to have the alternative road constructed.

[46] More pertinently, after the blockage, the defendants had issued a letter dated 23 August 2023 to the plaintiff that they were prepared to let the plaintiff use the disputed road subject to payment of toll charges. Although the plaintiff alleged that the letter was improperly addressed to Borhill Estates Sdn Bhd and not to them, it was not in dispute that the plaintiff subsequently received the letter. The defendants' offer was further informed by learned counsel for the defendants during one of the hearings where learned counsel for the plaintiff was present. However, the plaintiff simply refused to pay the toll charges.

[47] In the circumstances, I held that the plaintiff failed to establish their claim on a balance of probabilities.

The Defendants' Counterclaim

[48] The defendants' counterclaimed that the plaintiff had unlawfully entered and used the disputed road and accordingly had trespassed and continued to do so since 2002 until 15 August 2022, when the defendants stopped and prevented them from further using and trespassing. It was contended that by reason thereof the plaintiff was and had been a trespasser *per se*. Accordingly, the defendants claimed for loss and damages for trespass, and for the unlawful use of the disputed road.

[49] Relying on the Privy Council case of *Inverugie Investments Ltd v. Hackett* [1995] 3 All ER 841, it was submitted that the loss was to be calculated based on the "user principle" which in this case were the toll charges which the plaintiff would have paid for the use of the disputed road since 2002 as the plaintiff alleged. Through the financial controller of the third defendant, DW2, it was testified that the plaintiff had made a saving in the sum of RM1,653,700 by refusing or not paying toll charges since 2002 until 31 July 2022.

[50] There was no dispute that the plaintiff had used the disputed road. There was also evidence that the defendants' own workers had allowed the plaintiff to use the disputed road *albeit* they had to first put their details down in the "buku rekod keluar/masuk".

[51] There was further no dispute that despite the lapse of time since the plaintiff's initial entry in 2002, the defendants had not taken any action against the plaintiff for trespass. To this, DW3 had denied being aware of this matter before August 2022, however, the failure by the management of the defendants' companies and or its employees to inform DW3 of this matter was in my view irrelevant as even if true, this was an internal matter within the defendants' companies.

[52] In the case of *Ng Yee Fong & Anor v. EW Talalla* [1985] 1 LNS 146; [1986] 1 MLJ 25, Mohamed Azmi SCJ described the equitable doctrine of acquiescence as follows:

> The term acquiescence is used where a person refrains from seeking redress when there is brought to his notice a violation of his right of which he did not know at the time, and in that sense acquiescence is an element in laches. The term is however properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act (see *De Bussche v. Alt* (1878) 8 Ch D 286, 314).

[53] By allowing the plaintiff to use the disputed road, the defendants had acquiesced to the same – see *Kwong Hing Realty Sdn Bhd v. Malaysia Building Society Bhd & Anor* [1997] 1 CLJ Supp 167; [1997] 5 MLJ 670 and *Bell v. Alfred Franks & Bartlett Co Ltd & Anor* [1980] 1 All ER 356 at p. 360.

[54] In the circumstances, I found the plaintiff's defence to the defendants' counterclaim was made out. In so holding, I was cognisant that at first blush, this holding may seem inconsistent with my earlier decision on the plaintiff's claim. However, the short answer was that both the plaintiff's claim and the defendants' counterclaim were to be decided based on their respective causes of action. In other words, while the plaintiff's assertions amount to a defence to trespass, they did not automatically establish their claim for "unfettered right" over the disputed road.

Conclusion

[55] In the premises, both the plaintiff's claim and the defendants' counterclaim were dismissed with no order as to costs.